

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CRAIG D. HANSON,

Plaintiff,

v.

COUNTY OF KITSAP, WASHINGTON,
DAVID LYNAM, KITSAP COUNTY
FIRE MARSHAL, JOHN AND JANE
DOE, EMPLOYEE-AGENTS AND
FORMER EMPLOYEE AGENTS OF
KITSAP COUNTY,

Defendants.

CASE NO. 13-5388 RJB

ORDER ON THE PARTIES'
MOTIONS FOR PARTIAL
SUMMARY JUDGMENT AND
DEFENDANTS' MOTION FOR
RECONSIDERATION

This matter comes before the Court on the Plaintiff's Motion and Memorandum for Partial Summary Judgment Regarding Public Records Act and Defamation (Dkt. 126), Defendants' Cross Motion for Partial Summary Judgment Regarding Claims for Public Records Act and Defamation (Dkt. 137) and Defendants' Motion for Reconsideration (Dkt. 139). The Court has considered the pleadings filed regarding the motions and the remaining file.

1 Plaintiff, a veteran of the United States Army, United States Marine Corps, and
2 Washington Army National Guard, filed this employment case pursuant to Uniformed Services
3 Employment and Reemployment Rights Act ("USERRA") 38 U.S.C. § 4301, *et seq.* and state
4 law on May 22, 2013. Dkt. 1. In his second Amended Complaint, Plaintiff made USERRA
5 based claims for discrimination in employment based on his military service under 38 U.S.C. §
6 4311, for retaliation under § 4311, failure to reemploy to the proper reemployment position
7 under §§ 4312 and 4313; failure to provide proper benefits under § 4316; discharge without
8 cause under § 4316; and for failure to properly pay employee pension and other benefits under
9 §4318. Dkt. 45. Plaintiff also made state law claims for violations of the Washington Law
10 Against Discrimination ("WLAD"), Washington's Public Records Act ("PRA"), defamation and
11 liquidated damages. *Id.* He seeks damages, attorneys' fees and costs. *Id.*

12 The pending motions for partial summary judgment are two of the parties' many motions for
13 partial summary judgment. Plaintiff's first partial motion for summary judgment was denied on
14 October 10, 2013. Dkt. 37.

15 On May 22, 2014, the undersigned issued a 38 page Order, granting in part, and denying, in
16 part, the Defendants' two partial motions for summary judgment and Plaintiffs' two cross
17 motions for partial summary judgment. Dkt. 136. The facts and procedural history of this case
18 are contained in that Order (Dkt. 136, at 1-16), and are adopted here by reference. That Order
19 granted Defendants' motion for summary dismissal of Plaintiff's USERRA claims under §§4312
20 and 4313 (reemployment) and § 4316 (benefits), and his claims for hostile work environment
21 and constructive discharge, and those claims were dismissed. *Id.* Plaintiff's motion for
22 summary judgment on his USERRA claim under § 4318 (pension) was granted. *Id.* Defendants'
23 motion for summary dismissal of Plaintiff's USERRA claim for § 4311 (discrimination) and

1 claims under WLAD for discrimination was denied only to the extent that the claims were based
2 on the failure to promote him and his removal from the fire investigation rotation. *Id.*
3 Defendants' motion and Plaintiff's cross motion on the USERRA claim under § 4316 (without
4 cause discharge) were both denied. *Id.*

5 Plaintiff's claims for violation of the PRA and for defamation were not raised by the parties
6 in those motions.

7 On May 8, 2014, Plaintiff filed the instant motion for summary judgment on his PRA and
8 defamation claims. Dkt. 126. Plaintiff noted the motion for May 30, 2014. *Id.* Defendants
9 timely responded and within the response, filed a cross motion for partial summary judgment on
10 the same claims. Dkt. 137. In a footnote, Defendants further request that the May 20, 2014
11 dispositive motions deadline be extended to allow for this cross motion. *Id.*, at 1, n.1. Plaintiff
12 opposes the extension of time. Dkt. 141.

13 On May 29, 2014, Defendants filed their Motion for Reconsideration. Dkt. 139.
14 Defendants seek reconsideration of the Court's decision to deny summary judgment on
15 Plaintiff's § 4311 (discrimination) and WLAD retaliation claims on the basis that temporal
16 proximity alone is insufficient to establish retaliatory motive. Dkt. 139.

17 The case is set for on August 18, 2014. Dkt. 30.

18 This opinion will first consider Defendants' motion for extension of time (Dkt. 137), then
19 the noting dates for the motions for partial summary judgment, and lastly, the Defendants'
20 motion for reconsideration.

21 **MOTION FOR EXTENSION OF TIME**

22 Pursuant to Fed. R. Civ. P. 16(4), a case schedule may be modified for good cause.
23
24

Defendants' motion for a modification of the case schedule to extend the dispositive motions deadline for one week should be granted. Defendants have shown good cause and their motion should be permitted.

NOTING DATE FOR THE MOTIONS FOR PARTIAL SUMMARY JUDGMENT

The pending cross motions for partial summary judgment address the same claims. They should be considered together. The Plaintiff's Motion and Memorandum for Partial Summary Judgment Regarding Public Records Act and Defamation (Dkt. 126) and Defendants' Cross Motion for Partial Summary Judgment Regarding Claims for Public Records Act and Defamation (Dkt. 137) should be renoted for June 20, 2014. The response and reply, if any, should be filed in accord with the federal and local rules.

Motions practice in this relatively simple case has been extensive. Parties have over-briefed many of the issues. The undersigned is familiar with the entire record and does not need yet another rehashing of events. Be concise.

MOTION FOR RECONSIDERATION

Local Rule 7(h)(1) provides that motions for reconsideration are "disfavored, and will ordinarily be denied unless there is a showing of (a) manifest error in the ruling, or (b) facts or legal authority which could not have been brought to the attention of the court earlier, through reasonable diligence."

As stated in the May 22, 2014 Order, in deciding whether the employee's military service was "a motivating factor" in the employer's action, the burden-of-proof allocations approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983) are used. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 899 (9th Cir. 2002).

Under the scheme set forth in *Transportation Management*, the employee first has the burden of showing, by a preponderance of the evidence, that his or her

1 protected status was a substantial or motivating factor in the adverse employment
2 action; the employer may then avoid liability only by showing, as an affirmative
3 defense, that the employer would have taken the same action without regard to the
4 employee's protected status.

5 *Id.* (internal quotation omitted). Insofar as the “substantial or motivating factor” is concerned in
6 the Ninth Circuit:

7 Under USERRA, discriminatory motivation of the employer may be reasonably
8 inferred from a variety of factors, including proximity in time between the
9 employee's military activity and the adverse employment action, inconsistencies
10 between proffered reason and other actions of the employer, an employer's
11 expressed hostility towards members protected by the statute together with
12 knowledge of the employee's military activity, and disparate treatment of certain
13 employees compared to other employees with similar work records or offenses.

14 *Leisek*, at 900 (internal quotations omitted).

15 Defendants' motion for reconsideration of the Court's decision to deny summary
16 judgment on Plaintiff's § 4311 (discrimination) and WLAD retaliation claims on the basis that
17 temporal proximity alone is insufficient to establish retaliatory motive (Dkt. 139) should be
18 denied. Defendants have failed to point to a “manifest error in the ruling” or “facts or legal
19 authority which could not have been brought to the attention of the court earlier.” Defendants
20 point to unpublished cases that held, in the circumstances there, that the time between the
21 adverse employment action and the protected activity (or return from military service) was
22 insufficient to show a discriminatory motive and so the claims were dismissed. Dkt. 139.
23 Considering the facts at issue, the Court cannot do so here. The reasoning in the May 22, 2014
24 Order (Dkt. 136) is adopted. Moreover, despite Defendants urging to the contrary, in *Leisek*, the
Ninth Circuit held that “discriminatory motivation of the employer may be reasonably inferred
from a variety of factors including proximity in time between the employee's military activity
and the adverse employment action.” Defendants' motion for summary judgment should not be
granted.

ORDER

It is **ORDERED** that:

- Defendants' motion for extension of time (Dkt. 137) **IS GRANTED**;
- Plaintiff's Motion and Memorandum for Partial Summary Judgment Regarding Public Records Act and Defamation (Dkt. 126) **IS RENOTED TO JUNE 20, 2014**;
- Defendants' Cross Motion for Partial Summary Judgment Regarding Claims for Public Records Act and Defamation (Dkt. 137) **IS RENOTED TO JUNE 20, 2014**; and
- Defendants' Motion for Reconsideration (Dkt. 139) **IS DENIED**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 2nd day of June, 2014.



ROBERT J. BRYAN
United States District Judge